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12
13 UNITED STATES DISTRICT COURT

14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION

16 FLATWORLD INTERACTIVES LLC, a)
Pennsylvania limited liability company,)

17 Plaintiff,)

18 v.)

19 APPLE INC, a California corporation,)

20 Defendant.)

No. C 12-01956 JSW

**DECLARATION OF GEOFFREY C.
HAZARD, JR. IN OPPOSITION TO
APPLE'S MOTION TO DISQUALIFY
HAGENS BERMAN SOBOL
SHAPIRO LLP**

JURY TRIAL REQUESTED

DATE ACTION FILED:

April 19, 2012

1 I, Geoffrey C. Hazard, Jr., declare under penalties of perjury as follows:

2 1. I am Miller Distinguished Professor of Law Emeritus, Hastings College of the Law,
3 University of California; Trustee Professor of Law Emeritus, University of Pennsylvania; Sterling
4 Professor of Law Emeritus, Yale University, and Director Emeritus of the American Law Institute.
5 I am a member of the California bar.

6 2. For over 45 years I have studied, researched, taught and practiced in the fields of
7 civil litigation and professional ethics. I have been accepted as an expert in these matters in many
8 jurisdictions, federal and state, including in the states of California and Washington. I am special
9 ethics counsel to several law firms and to the American Bar Association Section of Business Law.
10 I am Consultant to the Standing Committee on Practice and Procedure of the Judicial Conference
11 of the United States. A copy of my professional vita is attached as Exhibit 1.

12 3. I have been engaged by the firm of Hagens Berman Sobol Shapiro LLP
13 ("Hagens Berman") to examine Apple's Motion to Disqualify Hagens Berman and supporting
14 declarations, and give my opinion concerning the issues Apple raises therein in *FlatWorld*
15 *Interactives LLC v. Apple Inc.* I have reviewed and executed adherence to the Protective Order in
16 the case. I am being compensated for my work.

17 4. In summary, in my opinion there is no indication of professional misconduct on the
18 part of Hagens Berman or of any receipt by that firm of Apple privileged information.
19 Disqualifying that firm in my opinion therefore would be unjustified.

20 5. As the basis for this opinion I have relied on the Narrative of Events prepared at my
21 request by Hagens Berman and attached hereto as Exhibit 2 as well as my decades of study and
22 knowledge of the applicable rules of professional conduct listed in my attached professional vita,
23 including, among others, my positions as Director of the American Law Institute and as a member
24 and consultant to the Standing Committee on Rules of Practice and Procedure for the Judicial
25 Conference of the United States, Reporter on the American Bar Association Special Commission
26 on Evaluation of Professional Standards, 1978-83, and my authorship of numerous books, articles,
27 and treatises relating to the standards of professional conduct and civil procedure. I am unaware of
28 any evidence or information inconsistent with that Narrative. I have also reviewed documents filed

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1 by Apple including the motion to disqualify Hagens Berman, the Declaration of Michael Pieja and
2 its exhibits, the Declaration of Michael Ossip, the Declaration of Cyndi Wheeler, and the
3 Declaration of Jeff Risher. I have further reviewed the declarations of Jennifer McAleese,
4 Slavoljub Milekic, Steve Berman, Mark Carlson, and Ryan Meyer. Based upon these references, I
5 understand the following to be true:

6 (a) FlatWorld was formed in January 2007. It has a patent that it claims is infringed by
7 certain Apple products in this litigation. FlatWorld's patent application was prosecuted by patent
8 attorney Gordon Nelson. Mr. Nelson has conferred with Hagens Berman about matters in this
9 litigation, but he is not involved in conducting the case.

10 (b) John McAleese was a partner in Morgan Lewis & Bockius LLP ("MLB"), a well-
11 known and highly respected firm with its main office in Philadelphia, which is also where Mr.
12 McAleese works and resides. His field is environmental law, and he is a member of MLB's
13 environmental practice group. He has no experience with patent law or litigation, he is not a
14 member of MLB's intellectual property group, and he has never worked on any case or matter for
15 Apple.

16 (c) MLB is, and has been for several years, counsel to Apple primarily for the purpose
17 of prosecuting patent applications, but it has not been counsel to Apple in the present litigation.
18 There is no evidence in the record that Mr. McAleese ever worked on any Apple matter, had access
19 to any confidential Apple information, or ever tried to access Apple's confidential information.

20 (d) Mr. McAleese is married to Jennifer McAleese, who is a 35% owner of FlatWorld
21 and who has handled the company's business affairs. On occasion since FlatWorld was formed,
22 Ms. McAleese requested her husband's assistance and advice on various matters she was handling
23 for FlatWorld. This included discussing the terms of FlatWorld's engagement agreement with
24 attorneys at Hagens Berman on February 27, 2012 at the request of Ms. McAleese.

25 (e) FlatWorld consulted several patent litigation firms before choosing Hagens Berman.
26 Ms. McAleese first contacted Hagens Berman about potential patent litigation representation in
27 January, 2012. The engagement agreement was negotiated by Ms. McAleese, except that Mr.
28 McAleese made one telephone call to Hagens Berman in February, 2012 to discuss certain terms of

1 the engagement agreement with which Ms. McAleese disagreed. FlatWorld engaged Hagens
2 Berman in March, 2012. This litigation was filed in April, 2012.

3 (f) Between March 2012 and February 13, 2013, there were no communications
4 between Mr. McAleese and Hagens Berman. After the deposition of Dr. Milekic on February 13,
5 2013, Mr. McAleese introduced himself at a lunch attended by Mark Carlson of Hagens Berman,
6 Ms. McAleese and Dr. Milekic. Other than to ask how Dr. Milekic had done in his deposition,
7 there was no discussion of this litigation with Mr. McAleese.

8 (g) FlatWorld's first privilege log, which was transmitted to Apple on February 22,
9 2013, listed documents received by Mr. McAleese, as to which the attorney-client privilege was
10 claimed. Apple or its counsel apparently noted that fact, and took note that McAleese was a
11 partner of MLB. Apple raised this issue with MLB.

12 (h) On February 26, 2013, Mr. McAleese contacted Mr. Carlson (of Hagens Berman)
13 and told him that he had learned that his name appeared as author or recipient of documents
14 withheld for attorney-client privilege on FlatWorld's privilege log. He said that he had not acted as
15 FlatWorld's attorney in his communications with Ms. McAleese.

16 (i) On February 28 and March 1, 2012, Mr. McAleese contacted Mr. Carlson and asked
17 that he produce the logged documents that he authored or received, so that he could show Apple
18 and MLB that he had not acted as Apple's attorney. Mr. Carlson refused, but subsequently agreed
19 to produce the documents to Apple if Apple would agree that production did not waive the
20 privilege. Mr. Carlson forwarded the written terms of such an agreement to Mr. McAleese.

21 (j) Hagens Berman undertook to review and correct FlatWorld's privilege log. Though
22 communications between Ms. McAleese and Mr. McAleese did not appear to be protected by the
23 attorney-client privilege in view of Mr. McAleese's statement that he did not regard himself as
24 FlatWorld's attorney, Hagens Berman attorneys considered the communications from Mr.
25 McAleese to his wife to be covered by the spousal privilege. Some of the underlying
26 communications that had been forwarded to John McAleese contained attorney-client
27 communications, and they are listed as such on FlatWorld's amended privilege logs. Hagens
28 Berman, in the period from February 26, undertook to update and correct its privilege log, and has

1 produced updated versions of its privilege log to Apple, the most recent being produced on May
2 31.

3 (k) After Apple objected to Mr. McAleese's inclusion on the FlatWorld privilege log,
4 MLB engaged an independent investigation of its network, computers and server, and determined
5 that no confidential Apple information had been accessed by Mr. McAleese, no attorneys working
6 on Apple matters had disclosed Apple confidences to him, and Mr. McAleese had not used MLB's
7 email system to disclose any Apple confidences.

8 (l) Hagens Berman lawyers state, and are prepared to testify, that they have received no
9 Apple confidences.

10 6. Based upon the above assumptions, I have the following opinions:

11 (a) John McAleese and Hagens Berman could not be regarded as co-counsel in this case
12 because they did not communicate at all for nearly a year after Hagens Berman was engaged, and
13 there is no evidence that Mr. McAleese rendered any legal advice or services to FlatWorld in this
14 case except one phone call to Hagens Berman to discuss terms of the engagement agreement.

15 (b) Apple asserts that its confidences were improperly disclosed by John McAleese.
16 However, Apple's moving papers do not contain evidence of any disclosure of confidential
17 information, and MLB's investigation confirmed that no confidential Apple information has been
18 disclosed. Apple provides the Declaration of Michael Ossip, which states that Mr. McAleese
19 informed Hagens Berman that Mr. McAleese understood that the FlatWorld privilege log disclosed
20 him as an author or recipient of documents withheld under the attorney-client privilege, and that he
21 did not believe he was acting as an attorney in his communications with his wife. Apple contends
22 that this communication from Mr. McAleese to Hagens Berman contained Apple's attorney-client
23 privileged information and was wrongfully disclosed to Hagens Berman.

24 (c) This communication is the sole basis for Apple's assertion that it was prejudiced by
25 a disclosure of confidential information to Hagens Berman. It is seriously arguable whether this
26 communication contained attorney-client privileged information and whether its disclosure was, in
27 any event, a waiver of the privilege. According to the Declaration of Mark Carlson this objection
28 was disclosed by Michael Pieja and/or James Shimota, Apple's litigation counsel, during a

1 discovery conference. To the extent that item of information was privileged at all before the
2 discovery conferences, their communication of this information surrendered any privilege.

3 (d) Even if this communication was confidential or privileged, and privilege was not
4 waived, disclosure of this communication could not have been prejudicial to Apple. The content
5 of the communication has no bearing on the underlying patent case and could not have caused
6 Apple to change its defense. Apple has not identified any way in which it has been harmed by the
7 disclosure to Hagens Berman. In my opinion, FlatWorld's assertion of the spousal privilege for the
8 forwarding emails to her husband in its amended privilege log does not constitute harm or
9 prejudice to Apple. Moreover, Apple has not identified any way in which it would continue to be
10 harmed by Hagens Berman's ongoing participation in this case.

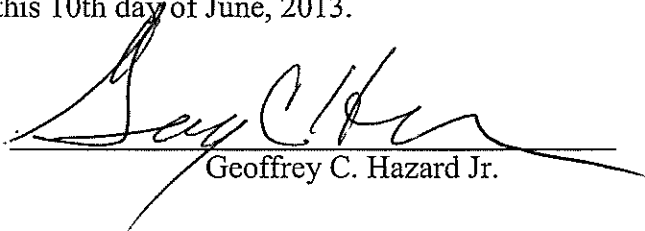
11 (e) Whether Mr. McAleese or MLB breached their duties to Apple is irrelevant to the
12 question of disqualification. Most of the communications with John McAleese occurred before
13 Hagens Berman was engaged as FlatWorld's outside patent litigation counsel. None of them
14 related to the management, tactics, or strategy of the present litigation.

15 (f) Apple has presented no factual or legal basis to impute Mr. McAleese's conduct,
16 knowledge, or duties to Hagens Berman.

17 7. Disqualification of counsel is a rare and harsh remedy. It is my understanding that
18 disqualification of Hagens Berman would severely prejudice FlatWorld's ability to pursue its
19 claims against Apple. In view of the relevant rules and standards of professional conduct, and in
20 view of the facts of this case, disqualification of Hagens Berman is unnecessary and unwarranted.

21 I declare under penalty of perjury, under the laws of the United States of America, that the
22 foregoing is true and correct.

23 Signed in San Francisco California, this 10th day of June, 2013.

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26 Geoffrey C. Hazard Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2013, I electronically filed the foregoing document using the CM/ECF system which will send notification of such filing to the email addresses registered in the CM/ECF system, as denoted on the Electronic Mail Notice List. Any non-CM/ECF participants will be served by electronic mail, facsimile and/or overnight delivery.

/s/ Steve W. Berman
STEVE W. BERMAN